

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

ALHAMBRA UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH NO. N2006020312

DECISION

John A. Thawley, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on May 22-26 and 30, 2006, in Alhambra, California.

Mark Woodsmall, Attorney at Law, represented Petitioner (Student). Student's Mother and Father attended the hearing.

Cyndi Dalton, Attorney at Law, represented Respondent Alhambra Unified School District (District). Laurel Bear, District Director of Pupil Services, also attended the hearing.

Oral evidence was received. At the close of the hearing, the parties agreed to file, by 5:00 p.m. on June 2, 2006, a stipulation to a joint evidence binder, as well as the binder itself, which was to incorporate all of the exhibits referenced during the hearing. The record was also held open for the filing of closing briefs by 5:00 p.m. on June 16, 2006. The parties filed the stipulation and joint evidence binder a day late. The briefs were timely filed; the record closed and the matter submitted on June 17, 2006.¹

¹ On June 1, 2006, OAH issued an order formalizing the deadlines for the submission of the stipulation, joint evidence binder, and closing briefs. Unfortunately, the parties failed to comply with the deadline set for the submission of the stipulation and joint evidence binder. In the future, such a failure may result in the imposition of sanctions. The order also set a 15-page limit for the closing briefs. Student filed a 31-page brief. In an abundance of caution, the undersigned ALJ reviewed that entire brief. However, the parties are cautioned that, in the future, ignoring an OAH-imposed page limit will presumably result in OAH disregarding any pages beyond the limit.

ISSUES

1. Did the District fail to offer Student a free, appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2005-2006 school year by:
 - a. Failing to design an individualized education plan (IEP) in October 2005 to meet Student's unique needs in the areas of behavioral support, speech and language (SL) therapy (SLT), and occupational therapy (OT)?
 - b. Failing to provide an IEP that contained sufficiently specific statements regarding the services to be provided?
 - c. Denying Student's parents the right to meaningfully participate in the development of the October 2005 IEP?
 - d. Failing to comply with its obligations to give prior written notice to Student with respect to formulating and implementing the IEP?
2. As a remedy, Student seeks placement in a non-public school serving both general and special education students, at least 30 hours per month of behavior modification services from a non-public agency, two hours per week of individual SLT from a non-public agency, one hour per week of OT from a non-public agency, and compensatory education.

FACTUAL FINDINGS

1. Student was born October 2, 2002, and lives within the District's boundaries. He is eligible for special education services due to autism. He currently attends a private preschool, and receives services from private providers, paid for by Mother and Father.

District's Assessment of Student

2. The East Los Angeles Regional Center (ELARC), which provided services to Student (including SLT and OT), referred him to the District. On September 13, 2005, District's multi-disciplinary assessment team assessed Student. The team was composed of Rosalyn Jones, school nurse, Veronica Nieto, the School Psychologist, Myrna Ramirez, District's Speech-Language Pathologist (SLP), and Deborah Weise-Minter, District's Learning Specialist. On September 15, 2005, Elizabeth Nye, District's OT provider, assessed Student. In addition, Ms. Weise-Minter and Ms. Nieto observed Student at the Almansor Center Preschool (Almansor), where he was attending a pre-school class of about

13 students, nine of whom had special needs.² Ms. Weise-Minter also conducted a telephonic interview of Student's teacher at Almansor.

Student's Unique Needs

3. The parties do not dispute that Student has SL needs in the areas of expressive language, receptive language, and articulation, as well as a speech disorder. Ms. Ramirez, District's SLP, reached these conclusions based on administering the Preschool Language Scale 4 (PLS 4), English edition, and based on her observations of Student's spontaneous utterances. The IEP notes indicate that Amy Johnson, Student's private SLP (who had informally assessed Student using diagnostic play activities), agreed with the results of Ms. Ramirez's assessment. Ms. Ramirez's report also noted that a previous private SLP reached similar conclusions after assessing Student using two different tests. Therefore, Ms. Ramirez's findings as to Student's SL needs were consistent with the findings of both Ms. Johnson and another private SLP.

4. The parties do not dispute that Student has OT needs in the area of fine motor skills, as well as delayed sensory processing, delayed ability to organize his behavior, and difficulty processing tactile, proprioceptive, and vestibular input.³ Ms. Nye, District's OT, reached these conclusions by clinically observing Student, talking to Mother, and talking to and reviewing the report of Student's OT provider (from the Center for Developing Kids, Inc., CDK). Doctor Diane Danis, Student's developmental pediatrician, reached similar conclusions. Janet Bowen, who performed Student's first OT assessment for the ELARC, reached similar conclusions, and noted delays in social skills and self-help skills. CDK reached similar conclusions, and noted delays in attention span. Therefore, Ms. Nye's findings as to Student's OT needs were consistent with the findings of CDK.

5. The parties do not dispute that Student has behavioral needs in the areas of social-emotional needs (including play skills), transitions, and attention. Ms. Weise-Minter, District's Learning Specialist, reached these conclusions based on administering several tests. Ms. Nieto, the School Psychologist, found that Student "demonstrated . . . socialization delays during all observational periods," as well as mild deficiency in adaptive behavior skills and an attention deficit. Dr. Danis reached similar conclusions and, as a result, recommended that Student receive various services (including a 1:1 aide trained to provide

² Mother and Father testified that, on May 3, 2006, they changed Student's placement to the Pasadena First United Methodist Church Preschool. They testified that they did not change the Student's placement for religious reasons, but rather because his Almansor class had shrunk from 10 students to 7 students (including Student), two of whom were siblings who played with each other.

³ At the hearing, some of the questions Student's attorney asked District witnesses appeared designed to assert that Student has an OT need in the area of gross motor skills, as well as a need for Alternative Physical Education (APE). The Prehearing Conference Order mentions Student's need for OT, but does not specifically refer to gross motor skills, nor does it mention APE. Also, Student's Complaint and Prehearing Conference Statement only mention OT as one of the proposed resolutions; neither document mentions gross motor skills or APE. Hence, gross motor skills and APE are not at issue here. Furthermore, Student did call any witness to testify regarding his needs in the areas of OT or APE. Therefore, even if gross motor skills and APE were at issue, Student failed to meet his burden of proof as to those issues.

Applied Behavior Analysis, ABA). The Center for Autism and Related Disorders (CARD) assessed Student based on observations at home, in school, and in a clinical setting over the period of April to June 2005, noted that Student displayed four types of maladaptive behavior – noncompliance, tantruming, self-injury, and elopement – as well as self-stimulatory behavior and a delay in his social behavior. CARD provided a 1:1 behavioral aide for 25 hours per week, including 10.5 hours per week of a “shadow aide,” which CARD recommended should gradually increase to a total of 30 to 40 hours per week as Student approached three years of age, as well as eight hours per month of supervision by an ABA consultant from one agency (to ensure consistency across environments). Therefore, the findings of Ms. Weise-Minter and Ms. Nieto as to Student’s behavioral needs were mostly consistent with the findings of Dr. Danis and CARD, with the exception of their differences over the necessity of a 1:1 ABA aide.

The IEP Team Meetings and District’s Placement Offer

6. The initial IEP team meeting began at about 8:30 a.m. on October 11, 2005.⁴ District personnel presented the results of their assessments. The experts that Mother and Father had arranged to attend the meeting – Ms. Johnson and Ms. Marina Bulkin (Student’s CARD case supervisor) – also presented their latest findings. Various District personnel asked questions of Ms. Bulkin, and perhaps of Ms. Johnson. Ms. Johnson did not disagree with the District’s SLT assessment results. There was considerable discussion at the meeting, including Ms. Johnson’s and Ms. Bulkin’s findings and recommendations. The meeting ended at about 12:30 p.m. due to the District’s contractual obligation to provide a lunch break for some of the District employees who were present. The IEP team agreed to re-convene in a week. Parents took the draft IEP goals and objectives home to review them.

7. The IEP team re-convened at about 2:00 p.m. on October 18, 2005. Parents stated that they read the narrative and noted that “some items had been left out.” Pursuant to Parents’ request, Ms. Bulkin presented additional information (regarding her observation of Student in his new classroom at Almansor). Father read aloud Dr. Danis’s report. There was additional discussion, and the IEP team modified two of the IEP goals to incorporate Ms. Bulkin’s findings or recommendations. The HS Disabilities Coordinator presented information about the HS program and teachers, and District personnel recommended that Student attend the HS program as the “inclusion program” in conjunction with the SLDA SDC. The meeting concluded between 4:00 p.m. and 4:30 p.m. On October 24, 2005, Mother visited HS. In November 2005, Mother and Ms. Hampson Stearns, the principal at the Moor Field School (Moor Field, the District’s special education campus) and the District’s Special Education Coordinator, exchanged letters regarding Mother’s HS visit and the qualifications of the HS teachers and aides. Parents never consented to the IEP. Nor did they ask for clarification of the IEP or request another IEP team meeting.

⁴ The initial IEP team meeting was held after Student turned three years of age because Mother asked that the meeting be delayed to allow the inclusion of Dr. Danis’s latest report in the meeting.

8. The District offered Student the Severe Language Disorders/Aphasia Special Day Class (SLDA SDC) at Moor Field for 3.75 hours per day for five days per week, OT for one hour per week in the Moor Field clinic, OT classroom support for 30 minutes each month, and two monthly parent support group meetings – one of which lasts for 90 minutes,⁵ and the other of which (specifically for the parents of autistic children) lasts for 60 minutes. The IEP noted behavior concerns – poor attention, limited play behavior, and limited language – that were to be dealt with using the interventions of the School/Classroom Management System and the IEP Behavioral Goals and Objectives (the SLDA SDC teacher was trained in ABA methodology at the Lovaas program at the University of California, Los Angeles). The IEP also stated that: Student was eligible for transportation; he would be recommended to attend the extended school year; and a number of modifications would be made to the curriculum (including cooperative learning groups, repeated directions, and verbal and/or physical prompts during Student transitions). The IEP notes reflect the discussion that the general education component of Student’s placement was to occur at HS. There were several options from which Mother and Father could choose, including half-day sessions in the morning or afternoon, or shorter sessions. At the Parents’ request, and immediately after the IEP team meeting, Ms. Nieto made a copy of the curriculum and sent it to the Parents.

Was District’s Offer Designed to Meet Student’s Unique Needs and Reasonably Calculated to Provide Educational Benefit?

9. The IEP included annual goals in the following SL areas of need: pre-academic/academic reading (listening to story books), and (as to language/communication), separate goals for following directions, sentence formulation, answering/asking questions, articulation, and vocabulary development. Each of the goals had accurate present levels of performance, as well as short-term benchmarks designed to ensure that Student progressed throughout the year. Ms. Johnson testified that the present levels of performance did not “specifically” include her findings. But, as noted in Factual Finding 3, Ms. Ramirez’s findings were consistent with the findings of Ms. Johnson and Ms. Berg. Ms. Ramirez established that, unlike her observation of Student’s placement at Almansor, the SLDA SDC was a language-rich environment taught by a licensed, credentialed SLP. The SLDA SDC teacher had two aides, while the number of students was capped at 13. In the SLDA SDC, specific SL skills were taught throughout the day using a variety of strategies with the hope of building a strong foundation of functional SL skills (as opposed to rote learning) that would allow the students to access the general education curriculum. Ms. Neter corroborated this description of the SLDA SDC – she described it as an “outstanding classroom” that is “language infused,” and noted that it blends a preschool development program with a language rich program. Ms. Ramirez believed that the SLDA SDC teaching strategies included directed play (or a “Floor Time”-type strategy), as recommended in Ms. Johnson’s March 2006 progress report. Ms. Ramirez established that, in light of the assessment’s findings that Student had deficits in social skills, additional individual SLT was not

⁵ The parent support group meeting is conducted by a marriage and family counselor. Teachers visit the meetings to explain programs and keep the parents up to date. Parents have access to a library of books and videotapes.

appropriate – Student needed more intensive intervention via a naturalistic classroom environment provided by the SLDA SDC.

10. The IEP included goals in the following OT areas of need: motor skills development (fine motor skills), self care (toileting), tactile processing, and sensory processing/organization of behavior (with a separate goal to focus solely on organization of behavior). Each of the goals had accurate present levels of performance, as well as short-term benchmarks designed to ensure that Student progressed throughout the year. As noted in Factual Finding 4, Ms. Nye's findings were consistent with the findings of CDK. Also, at the IEP team meetings, Ms. Nye was only asked questions during the discussion of OT goals and objectives (one of which, organization of behavior, she drafted at the meeting in response to Student's attorney's mention of toe-walking). She did not recall any objections to her recommendations or the OT goals at the IEP team meetings. She would monitor the OT goals, and consult with the classroom teacher (including the HS teacher, if Student attended HS and consented to the consultation).

11. The IEP included goals to address Student's behavioral issues in the social/emotional skills areas of need. Specifically, the IEP included goals in play, play skills, joint attention, attention, and transition. Each of the goals had accurate present levels of performance, as well as short-term benchmarks designed to ensure that Student progressed throughout the year. In addition, the IEP team discussed the Classroom Management System. Ms. Bulkin testified that the present levels of performance did not include her findings, and she faulted the annual goals and short-term benchmarks for not including a specific number of prompts. But the IEP contains several goals, objectives, and short-term benchmarks (for example, those established to develop Student's transitioning skills and his ability to follow teachers' directions) that were similar to and consistent with the goals, objectives, and short-term benchmarks drafted by Ms. Bulkin. While the IEP's short-term benchmarks do not state a specific number of prompts, they often set forth decreasing levels of cues and almost always provide for the teacher to maintain data as to Student's compliance and progress (the exception being the OT goals, which Ms. Nye was to monitor). Furthermore, Ms. Hampson Stearns established that the teacher (who was to collect and record data, and report on progress) would establish a baseline number of prompts against which to measure all future progress.

12. As to the difference of opinion between Dr. Danis/CARD and the District regarding the necessity of a 1:1 ABA aide, on September 21, 2005, Ms. Weise-Minter spent about 45 minutes at Almansor observing Student. At the time, Student did not have a 1:1 aide and did not appear to need one. Ms. Hampson Stearns noted that a good teacher would use any methodology that was effective (as to a student's behavior), so she did not believe it was appropriate to specify or stipulate to the use of Discrete Trial Training (DTT) for Student. According to Ms. Ramirez, the District's SLP, Student did not need a 1:1 aide, in part because Student could function in class without an aide, and because the presence of an aide (an adult shadowing Student) provided a very restrictive learning environment for Student (a belief shared by Ms. Weise-Minter). Ms. Ramirez has seen students become dependent on aides, and skills learned via a 1:1 aide using the ABA/DTT methodologies tend

to be “rote” and not generalized across environments. For all these reasons, Student did not require a 1:1 aide to receive a FAPE.

13. As to the capability of the District’s offer to assist Student in generalizing across environments the skills he would have gained, the HS staff also reviews the files of the children in their program, tracks data on their students, and has a close relationship with parents, so that the staff can ensure consistency by knowing about students’ home programs. The HS staff receives monthly two-hour in-service trainings on a variety of topics (such as language, literacy, special needs, and behavior). In addition, District and Moor Field staff members (including Ms. Hampson Stearns) have provided training sessions to the HS staff on topics such as strategies to work with special needs children (which Rebecca Martinez, the HS Lead Teacher, and her aides have used), to help ensure continuity between District and HS programs/placements. Ms. Martinez was not trained in ABA, but HS teachers and aides track student data via their notes and their memory, to ensure they record the cause of a behavior, how long the behavior lasted, the prompts used, and other relevant information.

14. Student asserts that the amount of time he would spend in the District’s program would be too demanding because it would infringe on his nap time and home-based services. But during the IEP team meeting, Ms. Bulkin did not mention that District’s offer would put Student’s home behavioral program at risk. Furthermore, a comparison of the total weekly number of hours Student would spend in education and services in each of the two placements (District versus Parents) reveals that they are roughly equivalent (particularly in light of CARD’s recommendation to increase the 1:1 aide’s time to about 30 to 40 hours per week). Thus, this assertion is without merit.

Least Restrictive Environment

15. Dr. Joseph Donnelly, who first diagnosed Student as autistic, noted in his neurological re-evaluation dated May 12, 2005, “[Student] is going to need a year-round aggressive special education program with minimum of 25 to 30 hours per week of service including home carryover.” Ms. Ramirez established that Student required the intensive intervention of the SLDA SDC. Ms. Nieto corroborated this belief – simply placing Student at HS with services would “obviously” not have been sufficient for his needs. The IEP team believed that the Moor Field Autism class, with sparse walls, covered toys, and three adults for eight students, was too restrictive for Student’s high-functioning level of autism.

16. The IEP team believed that Student should attend HS as the general education component of his program, in order to spend time with typically-developing peers. Ms. Martinez, who escorted Mother during her visit to HS in October 2005, pointed out that the HS program was for “enriched language and literacy.” The daily schedule of the morning session consists of the greeting, breakfast, then time for planning, work (HS has areas where the students can work on blocks, quiet, music, science, art, writing, math, etc.), recall, activity, play, story, music/movement, lunch, and then departure. The teachers and aides have a spectrum of qualifications. For example, Ms. Martinez has an associate’s degree in child development, with a credential and a Children’s Center (supervisor) permit, while the

afternoon HS teacher has a bachelor's degree with a Children's Center (teacher) permit. As to the length of Student's day at HS, Ms. Weise-Minter explained at the IEP team meeting that HS had a variety of program options (Mother and Father would have the choice of which time slot Student would attend, including the potential of a shorter day). Ms. Neter noted the amount of time each Moor Field student spent at HS was "individual." The HS building has a rest area, but only the longer-program options at HS have nap time. Father testified that, at the IEP team meeting, HS was not mentioned, nor was any general education placement mentioned as an option. But the IEP notes specifically reflect the discussion of HS as the District's recommended general education component of Student's program (which Mother and Father indirectly acknowledged during their testimony, and with Mother's visit to HS less than a week after the second IEP team meeting). Therefore, Father's testimony on this point was not persuasive.

17. Student asserts that District's offer was inappropriate because the SLDA SDC is made up exclusively of special needs students. Mother and Father expressed their concern that Student be placed with typically-developing peers, so that he could imitate/learn the correct speech and proper behavior of those peers, rather than learning or imitating the incorrect speech and maladaptive behaviors of special needs peers at the SLDA SDC. But there was no indication (in the reports of the assessments of Student) that Student would model undesirable language or behavior. In the experience of Ms. Hampson Stearns and Ms. Nieto, students with language delays do not experience additional delays when placed in a language rich environment. Ms. Hampson Stearns opined that research indicated that students do not model incorrect language. Ms. Ramirez was not concerned about Student modeling any incorrect speech he would hear in the SLDA SDC, because each student in the SLDA SDC had different delays. Furthermore, nine of the 12 or 13 students in Student's Almansor class had special needs. For all of these reasons, the SLDA SDC was an appropriate placement for Student.

Sufficiency of IEP Statements Regarding the Services District Would Provide

18. Student faults the IEP for not including information as to the collaboration that was to occur, inter alia, between District and HS personnel. The IEP team discussed, and the District recommended, that Student attend HS as the general education component of his program. The IEP required the collection of data, and trimesterly progress reports to the parents. Furthermore, during the IEP team meetings, the team discussed the collaboration that would occur. Ms. Hampson Stearns established that "everyone" was asked to help implement the IEP – it is a "very collaborative" process. The District and Moor Field closely coordinate with HS (including the roles of Ms. Neter and Ms. Hampson Stearns in the coordination and provision of training to the HS teachers on topics such as inclusion). Ms. Nye established that she collaborates with HS teachers, who incorporate her OT information, and that, if Mother and Father provided consent, she would collaborate with Student's teachers at both Moor Field and at HS. For all these reasons, the IEP team meeting and the IEP provided sufficient information regarding collaboration.

Parents' Right to Meaningfully Participate in the Development of the October 2005 IEP

19. Student also faults the IEP team for failing to meaningfully consider the recommendations of his experts during the IEP team meetings. Mother, Father, and Ms. Bulkin testified that Student's experts were not accorded the professional respect given to District's IEP team members, and that Student's experts were essentially not allowed to present their findings and recommendations because District personnel frequently interrupted the presentations of Student's experts to ask questions and seek clarification.

20. As noted in Factual Findings 6 and 7, the IEP team met for a total of about six hours, during which time the IEP team engaged in considerable discussion, exchange of information, and consideration of the IEP. This was more than ample time for the IEP team, including Mother, Father, and their attorney (who was present for both IEP team meetings), to discuss and consider the findings and recommendations of Student's experts.

District's Obligation to Provide Prior Written Notice to Student with Respect to Formulating and Implementing the IEP

21. Student claims that the mandate of prior written notice required the District to send a letter to Mother and Father to explain the basis for the District's rejection of the Student's experts' recommendations. Ms. Nieto gave Mother a copy of a statement of parental rights before Ms. Nieto began her initial assessment of Student on September 13, 2005. At the IEP team meeting, Mother and Father were "provided procedural rights and safeguards," as noted in the IEP narrative. The District made an offer of placement and services, as set forth in Factual Finding 8, which was obviously different than at least some of the recommendations of Student's experts. As noted in Factual Findings 6 and 7, there was lengthy discussion at the IEP team meetings regarding the District's proposed placement. This discussion included the basis of and reasons for the District's offer. Therefore, prior written notice would have been nothing more than a letter memorializing the discussions of the IEP team meetings – information that Mother and Father already knew.

APPLICABLE LAW PRINCIPLES

1. Student has the burden of proving the essential elements of his special education claims. (*Schaffer v. Weast* (2005) 546 U.S. ____, 126 S.Ct. 528, 163 L.Ed 2d 387.)

2. A child with a disability has the right to a FAPE. (20 U.S.C. §1412(a)(1)(A);⁶ Educ. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (§ 1401(9);

⁶ All statutory references are to the Individuals with Disabilities Education Act (IDEA), Title 20 of the United State Code, unless specifically noted otherwise.

Cal. Code Regs., tit. 5, § 3001, subd. (o).) “Special education” is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (§ 1401(29); Ed. Code, § 56031.) “Related services” or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (§ 1401(22); Ed. Code § 56363, subd. (a).)

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Ed. of the Hendrick Hudson Sch. Dist v. Rowley* (1982) 458 U.S. 176, 200 [*Rowley*].) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child’s unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child’s IEP. (*Id.* at pp. 206-207.)

4. In *Rowley*, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. But procedural violations constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents’ right to participate in the IEP process. (*Rowley*, *supra*, 458 U.S. at pp. 206-207; *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *MM v. Sch. Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 534; *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

5. Regarding procedural requirements, both State and federal law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code §§ 56304, 56342.5; 34 C.F.R. § 300.501(a), (c).) Education Code section 56341.1 requires, among other matters, that the IEP team consider strengths of the pupil and the concerns of the parents for enhancing the education of the pupil, as well as the results of the initial assessment or most recent assessment of the pupil. School officials and staff do not predetermine an IEP simply by meeting to review, discuss, and take notes regarding a child's evaluation and programming in advance of an IEP meeting, so long as they “come to the meeting with suggestions and open minds, not a required course of action.” (Compare *N. L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693-695, fn. 3; see also *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 994, with *Deal v. Hamilton County Bd. of Ed.* (6th Cir. 2005) 392 F.3d 840, 858; see also *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, citing *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. An IEP must include, in pertinent part, the child’s present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the child’s progress toward the annual goals will be measured. (§ 1414(d)(1)(A)(i), (ii), (iii) and (vii)(I); 34 C.F.R. § 300.347(a)(1), (2), (3) and (7)(i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).) Measurable annual goals enable the student, parents, and educators to monitor progress

and to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G.*, *supra*, 960 F.2d at p. 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.)

7. Parents' procedural right to participate in the IEP process includes the school district's obligation to make a formal written offer which clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether or not to accept the offer. (*Ibid.*)

8. Another key aspect of the parents' procedural right to participate in the IEP process is the school district's obligation to provide prior written notice whenever the school district "refuses to initiate or change the . . . educational placement of the child, or the provision of a [FAPE] to the child." (§ 1415(b)(3)(b); 34 C.F.R. § 300.503(a).) The notice is to contain:

- (1) a description of the action refused by the agency;
 - (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal;
 - (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards;
 - (4) sources of assistance for parents to contact;
 - (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's refusal.
- (§ 1415(c)(1); 34 C.F.R. § 300.503(b).)

9. As noted in Applicable Law Principle Number 3, the second prong of the *Rowley* test analyzes substantive appropriateness, specifically, the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The *Rowley* Court determined that a student's IEP must be designed to meet the student's unique needs, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. (*Rowley*, *supra*, 458 U.S. at pp. 188-189, 200-201.) To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley*, *supra*, 458 U.S. at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education

available or to provide instruction or services that maximize a student's abilities. (*Rowley*, *supra*, 458 U.S. at pp. 198-200.) Rather, the Court held that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K.*, *supra*, 811 F.2d at p. 1314.)

10. Moreover, the *Rowley* opinion established that, as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, *supra*, 458 U.S. at p. 208.) Subsequent case law confirms that this holding is squarely on point in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1146-1150; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Ore. 2001) 155 F. Supp. 2d 1213, 1230-1232.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B.*, *supra*, 361 F.3d at p. 84, citing *Roland M.*, *supra*, 910 F.2d at pp. 992-993.)

11. Federal and state law also require school districts to provide a program in the LRE to each special education student, including preschool-aged children. (See 34 C.F.R. § 300.552 [subsection (e) uses the term "age-appropriate regular classrooms," but note that there is no "regular classroom" for preschool-aged children, because there is no compulsory education prior to kindergarten]; see also *Letter to Neveldine* (1995) 22 IDELR 630; *Letter to Grether* (1994) 21 IDELR 60.) The requirement to provide a program in the LRE is often referred to as "mainstreaming." A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (§ 1412(a)(5)(A); 34 C.F.R. § 300.550(b).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code § 56031.) The law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption." (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also § 1412 (a)(5)(A); *Rowley*, *supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834; *Sacramento City Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398.) But the Supreme Court has noted that IDEA's use of the word "appropriate" reflects Congressional recognition "that some settings simply are not suitable environments for the participation of some handicapped children." (*Rowley*, *supra*, 458 U.S. at p. 197.)

LEGAL CONCLUSIONS

Issue 1: Did the District fail to offer Student a free, appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2005-2006 school year by failing to design an IEP in October 2005 that met Student's unique needs in the areas of behavioral support, SLT, and OT?

12. Based on Factual Findings 2 through 14, and Applicable Law Principle Nos. 1 through 3, 9, and 10, the District's offer provided Student with a FAPE for the 2005-2006 school year, in that it was designed to meet his unique needs and was reasonably calculated to provide Student with some educational benefit.

13. Based on Factual Findings 2 through 17, Applicable Law Principle Nos. 1, 2, 3, and 11, and Legal Conclusion 12, the District's offer of the SLDA SDC, combined with HS, provided Student with a FAPE in the LRE. Student requires the intensive intervention of the SLDA SDC, and HS provides the general education component that allows Student exposure to and education with typically-developing peers while allowing him to generalize across environments.

Issue 2: Did the District fail to offer Student a free, appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2005-2006 school year by failing to provide an IEP that contained sufficiently specific statements regarding the services to be provided?

14. Based on Factual Findings 2 through 18, and Applicable Law Principle Nos. 1 through 4, 6, and 7, the IEP provided sufficiently specific statements regarding the services to be provided to permit the parties to know what was being offered. The IEP notes clearly reflect the discussion that took place regarding District's recommendation and offer of HS as the general education component of the proposed placement. In addition, the collaboration between District and HS personnel was discussed during the IEP team meetings. Mother visited HS less than a week after the second IEP team meeting. Mother and Father did not seek any clarification of the offer, nor did they request any additional IEP team meetings. Thus, any procedural violation of failing to note in the IEP the appropriate collaboration was de minimis. Any such procedural violation did not cause Student to lose an educational opportunity, nor did it significantly infringe on the right of Mother and Father to participate in the IEP process.

Issue 3: Did the District fail to offer Student a free, appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2005-2006 school year by denying Student's parents the right to meaningfully participate in the development of the October 2005 IEP?

15. Based on Factual Findings 2 through 17, 19, and 20, and Applicable Law Principle Nos. 1 through 5, the District did not deny Parents the right to participate in the IEP process.

Issue 4: Did the District fail to offer Student a free, appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2005-2006 school year by failing to comply with its obligations to give prior written notice to Student with respect to formulating and implementing the IEP?

16. Based on Factual Finding 2 through 8, and 21, and Applicable Law Principle Nos. 1 through 4, and 8, any District violation of the Parents' right to prior written notice as to the basis of and the reasons for the District's offer of placement and services, including the rejection of the recommendations of Student's experts, was de minimis. Any such procedural violation did not cause Student to lose an educational opportunity, nor did it significantly infringe on the right of Mother and Father to participate in the IEP process.

ORDER

The District's offer, in the IEP dated October 11 and 18, 2005, constituted a FAPE in the LRE.

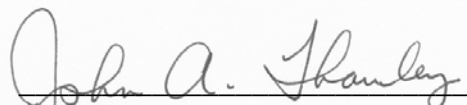
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues in this matter.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: June 26, 2006



JOHN A. THAWLEY
Administrative Law Judge
Special Education Division
Office of Administrative Hearings